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February 11, 2005

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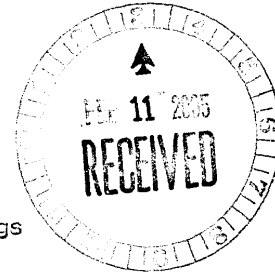
Via Hand Delivery

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K St. N.W.
Washington, D.C. 20423

ENTERED
Office of Proceedings

FEB 11 2005

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RE: STB Docket No. 42071, *Otter Rail Power Company v. The Burlington Northern and Santa Fe Railway Company*

Dear Secretary Williams:

Please find enclosed for filing the original and ten (10) copies of Complainant's Reply to Defendant's Petition for an Order Clarifying the Scope of Supplemental Evidence in the above referenced proceeding. Also enclosed is one diskette with a copy of the Reply in PDF format and Word format.

An extra copy of Reply is enclosed for stamping and returning to our offices.

Should you have any questions regarding the foregoing, please do not hesitate to contact the undersigned.

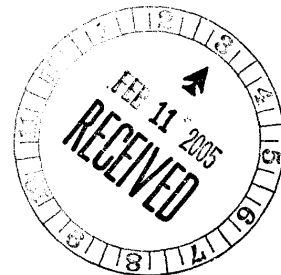
Sincerely,

Nicholas J. DiMichael
Jeffrey O. Moreno
Counsel for Complainant

cc: Counsel for Defendant

2/3239

BEFORE THE
SURFACE TRANSPORTATION BOARD



OTTER TAIL POWER COMPANY,)

Complainant,)

v.)

BNSF RAILWAY COMPANY,)

Defendant.)

Docket No. 42071

ENTERED
Office of Proceedings

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Public Record

COMPLAINANT'S REPLY TO
DEFENDANT'S PETITION FOR AN ORDER CLARIFYING THE SCOPE OF
SUPPLEMENTAL EVIDENCE

Otter Tail Power Company ("Otter Tail") hereby replies in opposition to "Defendant's Petition for an Order Clarifying the Scope of Supplemental Evidence" ("BNSF Petition"), filed on February 7, 2005 by BNSF Railway Company ("BNSF"). BNSF has asked the Board to improperly narrow the original scope of the supplemental evidence that the Board has requested in its December 13, 2004 Order ("Dec. 13th Order").

I. INTRODUCTION

Substantively, BNSF's Petition is an incorrect and unworkable interpretation of the December 13th order. The Petition also suffers from procedural infirmities, in that BNSF has essentially filed a preemptive motion to strike evidence that neither the railroad nor the Board has yet seen. The Board should promptly deny BNSF's Petition.

BNSF's requested "clarification" attempts to force on Otter Tail a fundamental error that permeates BNSF's own modeling of the stand-alone railroad ("SARR") in this proceeding. In this case, both parties have agreed that the SARR at issue extends from Converse, WY north to Donkey Creek, WY, thence westward and north to Glendive, MT, then eastward to Fargo, ND,

and finally to the destination at Big Stone, SD. Otter Tail also has included a line segment on its SARR from Glendive, MT to Snowden, MT to handle rerouted northern non-coal traffic that BNSF has excluded from its SARR.

Otter Tail modeled its complete SARR, using the string model. However, in its evidence, BNSF did not model its complete SARR, but only certain unconnected line segments. Specifically, BNSF modeled only two segments of the SARR using the RTC Model, one from Oriva, WY to Converse, WY, and the other from Glendive, MT to Fargo, ND.¹ BNSF chose not to model the SARR from Oriva, WY to Glendive, MT and from Fargo, ND to Big Stone, SD.² See BNSF Reply Evid. at III.B-7 to 8 (filed Oct. 8, 2003). For these latter two segments, BNSF simply accepted Otter Tail's capacity evidence, stating that it did so because the SARR's capacity was similar to the real-world BNSF capacity over those segments, despite differences between the SARR and real-world BNSF traffic levels. See BNSF Reply Evid. at III.B-7 to 8 (filed Oct. 8, 2004). Exhibit A, attached hereto, illustrates the unconnected SARR segments modeled by BNSF using the RTC Model, and the complete SARR modeled by Otter Tail using the string model.

In modeling just two of four unconnected segments on the SARR, BNSF has not properly linked the traffic flows between the various line segments and is unable to measure the impact of changes that occur on one line segment upon other line segments. Otter Tail has thoroughly

¹ Although BNSF originally modeled a third line segment from Glendive, MT to Snowden, MT, it eliminated that line when it subsequently excluded all rerouted northern non-coal traffic. See BNSF Supplemental Reply Evidence at III.B-1 (filed March 22, 2004).

² BNSF did run a single train over the Fargo to Big Stone line segment on the RTC Model, but did not otherwise model all of the traffic on that line or link the RTC Model of that line segment with the RTC Model of the adjoining line segment from Fargo to Glendive.

addressed this issue at pages III-B-25 to 27 and III-B-40 to 42 of its April 29, 2004 Rebuttal Evidence and will not repeat those arguments here.

As this issue relates to the December 13th order, BNSF insists that the Board restricted Otter Tail's evidence based upon the RTC Model to the same segmented analysis that BNSF has performed. There is nothing in that order, however, to suggest such a limitation or to indicate that the Board intended to resolve this sharply disputed issue in favor of BNSF. Indeed, as discussed in more detail below, the precise language used by the Board indicates that it has requested a SAC analysis of two major traffic group variations and a corresponding cross-subsidy analysis. Otter Tail strongly believes that the parties cannot provide a complete and accurate response without modeling the impacts upon the complete SARR and that this procedure conforms to the clear direction of the Board's order.

II. OTTER TAIL'S SUPPLEMENTAL EVIDENCE
WILL CONFORM TO THE CLEAR DIRECTION OF THE BOARD'S ORDER

Otter Tail never has doubted the scope of the December 13th order, which is clear on its face. That order directed Otter Tail "to file supplemental evidence showing the effect if the disputed rerouted northern non-coal traffic were excluded from *its* traffic group," and to show the "impact on the SAC analysis" of excluding that traffic. Dec. 13th Order at 2 [emphasis added], and 3. The Board invited Otter Tail to "submit its evidence based on the Rail Traffic Controller model used by BNSF, in lieu of its string model." Id. at 3. Otter Tail has elected to accept the Board's invitation to present its supplemental evidence using the RTC Model.

In order to show the effect of excluding the rerouted northern non-coal traffic "from its [Otter Tail's] traffic group" and the "impact on the SAC analysis" of this exclusion using the RTC Model, Otter Tail must first model its traffic group on the RTC Model to obtain a baseline measurement that includes the disputed traffic, and then it must run the RTC Model without that

traffic. This does not implicate “broad or complex” issues or constitute a new opening case-in-chief, as BNSF claims.

Otter Tail’s evidence will be confined to the two issues discussed in the December 13th order. Consistent with that order, Otter Tail has no intention of presenting new evidence on unit costs, revenue allocations, or any similar evidence disputed by the parties. Otter Tail intends merely to calculate the different investment and operating units that result from excluding the rerouted northern non-coal traffic from the SARR when using the RTC Model. Otter Tail then will apply these revised units to its rebuttal evidence unit costs to generate operating and investment costs and a DCF model that shows the effect on the SAC analysis of excluding the rerouted northern non-coal traffic from Otter Tail’s traffic group. The Board, which clearly is familiar with this process, could not have intended that Otter Tail do anything less when it invited Otter Tail to use the RTC Model.

III. BNSF HAS ENGAGED IN A REVISIONIST INTERPRETATION OF THE BOARD’S ORDER

BNSF engages in a tortured reading of the December 13th order in an effort to persuade the Board to unduly narrow this scope of supplemental evidence. According to BNSF:

The Board sought evidence from Otter Tail on the amount of capacity that could be eliminated from Otter Tail’s existing capacity plan for the Glendive line if the rerouted traffic was excluded from the SARR group, the corresponding reduction in the operating costs, and the effect of these changes on Otter Tail’s previously filed SAC results. These are discrete and limited issues. Moreover, the Board instructed Otter Tail to evaluate the impact of eliminating the rerouted traffic from the Glendive line.

BNSF Petition at 4 [italics in original; underline added]. The underscored language does not appear anywhere in the December 13th order. Moreover, since Otter Tail does not have an “existing capacity plan” for just “the Glendive line” based on the RTC Model, BNSF’s interpretation would render the Board’s invitation to use the RTC Model meaningless.

The Board never even referred to the Glendive line in its request for supplemental evidence. Rather, the Board asked Otter Tail to show “the impact *on the SAC analysis*” of excluding rerouted northern non-coal traffic from “its traffic group,” not from any particular line segment. Dec. 13th Order at 2, 3 [emphasis added]. Because traffic changes on one line segment have effects throughout a rail system, BNSF’s attempt to confine the supplemental evidence to the Glendive line will not capture the full impact of excluding the rerouted northern non-coal traffic “on the SAC analysis.” BNSF’s revisionist interpretation ignores the precise language of the December 13th order, which clearly reflects an understanding of this fact.

BNSF’s interpretation of the Board’s order is merely an attempt to force its segmented approach to capacity modeling upon Otter Tail. BNSF suggests that:

If Otter Tail chooses to use the RTC model in its supplemental evidence, it can comply with the Board’s December 13, 2004 order by simply modeling the segment of the OTRR between Glendive and Fargo where the rerouted general freight traffic has been removed, identifying the new capacity requirements and operating statistics for that segment and substituting those assumptions for the assumptions used in Otter Tail’s prior evidence.

BNSF Petition at 5 [emphasis added]. But, in order to make this approach work, the Board would have to force BNSF’s segmented approach to modeling the SARR, and all of its associated assumptions, upon Otter Tail.

Notably, BNSF does not ask the Board to restrict Otter Tail’s evidence to a segmented approach if Otter Tail chooses to use the string model; but only if it uses the RTC Model. Otter Tail, in fact, could not incorporate its string model into this segmented approach, since Otter Tail’s string model results are based on a complete system analysis. In order to conduct a meaningful comparison of the effects upon the SAC analysis of removing the rerouted northern non-coal traffic from its traffic group using the string model, Otter Tail would have to compare its rebuttal SAC analysis with a comparable system-wide SAC analysis without the rerouted

traffic. BNSF has not explained why this analysis should be any different if Otter Tail uses the RTC Model.

Furthermore, the Board did not express any intent to force Otter Tail to choose between its system-wide approach and BNSF's segmented approach when choosing whether to use the string model or the RTC Model to develop its supplemental evidence. Nevertheless, that would be the effect of granting BNSF's Petition.

By requiring Otter Tail to accept BNSF's segmented approach to using the RTC Model, BNSF would render Otter Tail's use of the RTC Model a redundant and meaningless exercise, since it would assure almost identical results to BNSF's supplemental reply evidence. For example, without modeling the complete SARR, Otter Tail cannot know what trains should enter the Glendive-Fargo line segment at either end point and when. The only information available to Otter Tail would be that generated in BNSF's March 22, 2004 supplemental reply evidence. Since that approach simply would replicate BNSF's own supplemental reply evidence, which already excludes the rerouted northern non-coal traffic, it would virtually assure that Otter Tail's evidence closely resembles BNSF's evidence. The Board could not have intended that consequence when it invited Otter Tail to use the RTC Model.

IV. BNSF'S INTERPRETATION CONFLICTS WITH THE BOARD'S REQUEST FOR A CROSS-SUBSIDY ANALYSIS.

The Board invited Otter Tail to submit *all* of its supplemental evidence based on the RTC Model. Dec. 13th Order at 3. This includes the cross-subsidy analysis based on PPL Montana, LLC v. The Burlington Northern and Santa Fe Ry. Co., STB Docket No. 42054 (served Aug. 20, 2002) at 10-13. BNSF's unduly narrow interpretation of the December 13th order would be equally incorrect and unworkable for this analysis, which BNSF's Petition ignores entirely.

In order to properly conduct the cross-subsidy analysis of the SARR called for in the December 13th order, Otter Tail must employ a consistent methodology to model its SARR. It would not be proper, for example, to perform a PPL analysis when one line segment has been modeled using the RTC Model and the other segment has been modeled using the string model. Thus, by restricting Otter Tail's use of the RTC Model to *only* the Glendive-Fargo line segment, BNSF would prevent Otter Tail from using the RTC Model to conduct the cross-subsidy analysis requested by the Board. This interpretation of the December 13th order cannot be reconciled with the Board's invitation, in the very same order, for Otter Tail to use the RTC Model in its cross-subsidy analysis.

BNSF's segmented modeling approach also would skew the cross-subsidy analysis, because it ignores the upstream and downstream impacts of activity on the Glendive-Fargo line upon other line segments, and vice versa. Since altered traffic levels on one line segment can affect the infrastructure and operating requirements on other line segments, it is necessary to capture the impacts on those other line segments in order to perform a proper cross-subsidy analysis. The Board surely did not intend to direct the parties to perform an incomplete cross-subsidy analysis.

V. BNSF'S PETITION IS INCONSISTENT WITH THE PURPOSE OF THE BOARD'S ORDER

BNSF's Petition is inconsistent with the overall purpose of the December 13th order, in which the Board sought additional evidence "so that we will have an adequate record upon which to decide the case." Dec. 13th Order at 2. This is the *only* case since BNSF began using computerized models in which BNSF has declined to model the complete SARR. Otter Tail did not fully understand why BNSF took its odd, truncated approach until Otter Tail itself began to model its traffic group on the RTC Model in response to the December 13th order. Otter Tail now believes that BNSF adopted its disconnected, segmented, approach because it could not get

the results it wanted by modeling the complete SARR on the RTC Model. Because the Board's invitation for Otter Tail to use the RTC Model threatens to expose BNSF's "shell game," it appears that BNSF is attempting to preemptively strike Otter Tail's evidence by trying to persuade the Board to narrow the original purpose and scope of its December 13th order.

Since the Board has granted BNSF a right to reply to Otter Tail's supplemental evidence, BNSF cannot, nor does it, claim prejudice. There is in fact no prejudice, since BNSF will have 30 days to file a reply to Otter Tail's limited evidence.

However, BNSF's Petition is a transparent attempt to set the stage for requesting an extension of time to reply to Otter Tail's supplemental evidence if the Board denies the Petition itself. BNSF claims that "[t]he procedural schedule established by the Board is not adequate to deal with the complications that would be introduced by Otter Tail's proposed new evidence." BNSF Petition at 6. But, BNSF has not identified any of its alleged complications. Moreover, as Otter Tail has demonstrated above, its supplemental evidence will be limited and will not constitute a new case-in-chief. Indeed, Otter Tail's ability to prepare its evidence in less than 45 days is flatly inconsistent with BNSF's charge that Otter Tail is preparing a new case-in-chief.³ Thus, BNSF should have sufficient time to prepare its reply within 30 days. In any event, the

³ Otter Tail did not receive a working version of the RTC Model until January 7, 2005, which is when Otter Tail began preparing its supplemental evidence. However, by January 28, 2005, Otter Tail learned that the computer on which BNSF installed the RTC Model for Otter Tail's use did not have sufficient memory to run the program for the complete SARR. Because BNSF subsequently denied Otter Tail permission to increase the memory or to use another computer, Otter Tail could not prepare its evidence for several days. In the face of BNSF's refusal to provide the RTC Model on a computer that met even the vendor's recommended minimum requirements for running the program, Otter Tail was required to expend \$45,000 to purchase its own copy of the RTC Model so that it could submit its supplemental evidence by the due date established in the Board's January 18, 2005 order.

Board should not extend the procedural schedule at this time based upon speculation about evidence that has not even been filed yet.

For the foregoing reasons, Otter Tail requests that the Board deny BNSF's Petition for Clarification.

Respectfully submitted,



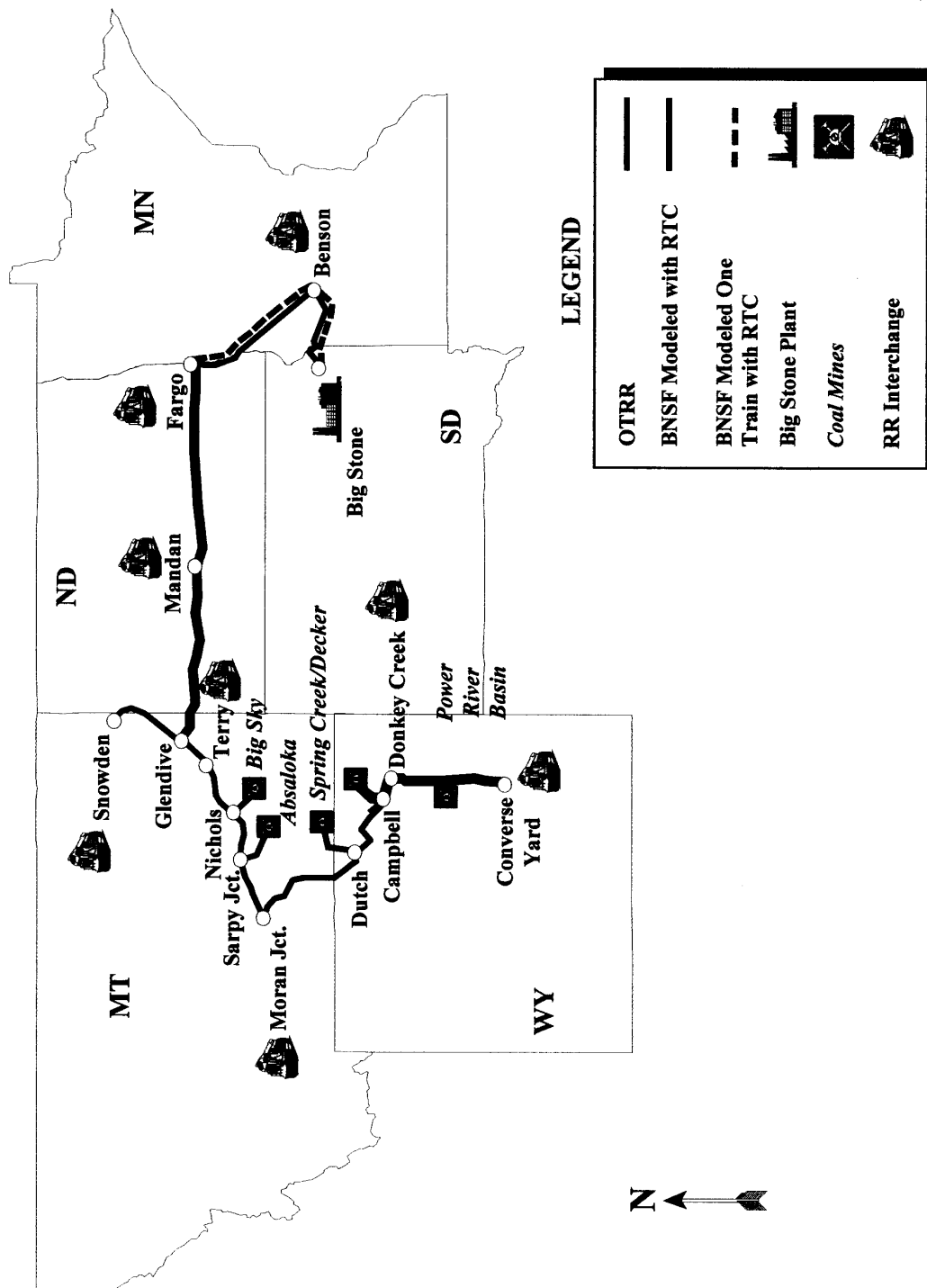
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Dated: February 11, 2005

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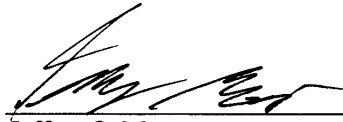
SCHEMATIC OF THE OTTER TAIL RAILROAD



CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of February, 2005, I served a copy of "Complainant's Reply to Defendant's Petition for an Order Clarifying the Scope of Supplemental Evidence" by hand delivery to counsel for Defendant at the following address:

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Jeffrey O. Moreno